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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 451

NORMAN BAKER, PETITIONER

v.

WALTER A. HUNTER, SUCCESSOR TO ROBERT H. HUDSPETH AS WARDEN OF UNITED STATES PENITENTIARY, LEAVENWORTH, KANSAS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 455–461) is reported in 129 F. (2d) 779. The findings of fact and conclusions of law by the district court appear at R. 81–87.

JURISDICTION

The judgment of the circuit court of appeals was entered July 9, 1942 (R. 461–462), and a petition for rehearing was denied September 2, 1942

(R. 465). The petition for a writ of certiorari was filed October 9, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Petitioner was convicted for violations of the Mail Fraud Statute. Upon application for a writ of habeas corpus, petitioner sought to obtain his release from custody on the ground that he had been deprived of a fair and impartial trial. Two questions are presented:

1. Whether petitioner was prejudiced by the handling and conduct of the jury, which was segregated during the trial.

2. Whether petitioner was prejudiced by reason of the fact that one of the jurors failed to disclose on his *voir dire* that he was an assistant postmaster and as such attended to the post office in his brother's country store whenever his brother was away.

STATEMENT

On January 25, 1940, petitioner was convicted (R. 68) in the United States District Court for the Eastern District of Arkansas on all seven counts of an indictment (R. 50–68) charging violations of the Mail Fraud Statute (Sec. 215, Criminal Code (18 U. S. C. 338)). He was sentenced generally to imprisonment for four years

and to pay a fine of $4,000 (R. 68–69). The judgment of conviction was affirmed on appeal (115 F. (2d) 533), and this Court denied certiorari (312 U. S. 692; rehearing denied, 312 U. S. 715). On March 22, 1941, petitioner was committed to the United States Penitentiary at Leavenworth, Kansas (R. 69–70).

Ten days later, on April 1, 1941, petitioner filed in the United States District Court for the District of Kansas a petition for a writ of habeas corpus (R. 9–46), challenging the legality of his detention on the ground that he had been deprived of a fair and impartial trial by (1) the handling and conduct of the jury during the fifteen days of the trial, (2) the fact that one of the jurors did not reveal in his *voir dire* examination that he was an assistant United States postmaster, and (3) the trial court's exclusion of certain evidence he sought to introduce as part of his defense. The writ was issued (R. 87), the respondent filed a return (R. 46–70), and a hearing was held (R. 430–454), at which petitioner was present and testified and was represented by counsel (R. 451–452). On the basis of the evidence adduced at the hearing, the trial court made Findings of Fact and Conclusions of Law (R. 81–87) in which all issues were determined in favor of the respondent generally, and ordered the writ discharged (R. 87–89). Upon appeal to the circuit court of appeals, the judgment was affirmed (R. 461–462).

The findings of the trial court (R. 81–86) may be summarized as follows:

On the first day of the trial, which lasted 15 days, the court ordered the jury segregated (R. 139, 200, 221),[1] and two bailiffs were appointed by the marshal and specially sworn to take charge of the jury (R. 339, 413). The marshal made arrangements to house all the members of the jury on the same floor of the Freiderica Hotel (R. 248, 268, 380, 396, 413), the entire floor being reserved for their exclusive use (R. 248, 268, 380, 396). The bailiff in charge of the jury had an office in front of the elevator (R. 139, 140, 172, 190, 249, 254, 268, 306, 325, 340, 362), and his telephone was the only one available to the jurors (R. 268, 322, 367). Meals were furnished by the hotel and paid for by the marshal (R. 269–275, 321, 322–323, 340, 413). Newspapers were inspected and all matter pertaining to the trial eliminated before they were given to members of the jury (R. 119, 137, 218, 249, 275, 362, 414). Mail addressed to jurors was delivered to them by deputy marshals (R. 275, 276, 277, 331).

The court found (R. 83–84) that "on one occasion during the first week of the trial two women deputies in the office of the marshal, together with

[1] Although petitioner does not challenge the sufficiency of the evidence to support the findings, we have added, in parentheses, references to testimony which substantiates them.

the chief deputy marshal, Mr. Bradley, delivered mail to members of the jury at the hotel and accepted an invitation to remain for dinner (R. 141, 144, 168, 277, 306, 331, 414). Following the dinner, they played cards in the bailiff's room with some members of the jury until 9:30 p. m., at which time they left in company of the chief deputy marshal (R. 278–279, 306, 332–333).

"On a later occasion a birthday dinner was arranged for a member of the jury (R. 152, 281–282, 307, 321, 332, 380, 400), which was attended by these two women deputies and by the chief deputy and following which they played cards with some members of the jury until about 10 p. m., at which time they left (R. 114, 125, 151, 191–192, 201–202, 225, 251, 262, 282–283, 307, 321, 332–333, 340–341, 380, 414–415). The women deputies did a few errands at different times for some of the jurors (R. 276, 399). On one occasion a juror, accompanied by a deputy marshal, made a trip to the juror's farm where the juror conferred with his farm manager about cleaning up the farm (R. 309, 312, 359–360). The trip consumed an hour and thirty minutes (R. 359). The jury went to church once (R. 126–127, 234, 261, 349–350, 364, 382, 417) and attended a basket ball game (R. 127, 159, 193, 235, 347–348, 365, 382, 417) in the company of the sworn bailiffs, and on one occasion attended a picture show (R. 158, 193, 417). A sworn bailiff took a juror to get a haircut, one for a shave

(R. 120–121, 135, 160, 180–181, 196, 205, 215–216, 235, 257, 374), and on one occasion the jury with a sworn bailiff and a deputy marshal accompanying them took a drive around the city visiting a zoo and an army camp (R. 155–156, 158, 345–346, 365, 375, 417). Juror Beard's wife visited him briefly and some days later telephoned. The sworn bailiff listened in on both conversations (R. 117, 118, 119, 252; see also, R. 309–310). The wives of jurors Shook and Smith had dinner with their husbands one evening. They ate in a room apart from the dining room occupied by the members of the jury (R. 129, 362)."

The court also found (R. 84) that "there was at no time any extraneous or prejudicial mention or discussion of the case" between the jurors or between any member of the jury and any other person. "The evidence is absolutely and entirely to the effect the case was not discussed with anyone; nor among the jurors themselves until they retired to deliberate upon their verdict (R. 119–120, 128, 130, 136, 163–164, 184, 206–207, 251–252, 265, 280, 283, 308, 316–317, 329, 334, 342, 351–352, 364, 365, 383, 398, 417). There was no corruption, intimidation, coercion, or prejudicial or improper influencing of any member of the jury, and the record is devoid of evidence of any attempt to bring it about."

With reference to petitioner's claim that he was prejudiced by the statement made by the marshal

on the evening of the first day of the trial, the court found that the marshal had "called the jurors together into the bailiff's room and explained to them the nature of their confinement and segregation, and the rules pertaining thereto (R. 161, 173, 190, 214, 223–224, 397, 409), and it is the opinion and finding of the court that in so doing the marshal acted in the exercise of his official duties as marshal in respect to the general conduct, comfort, and welfare of the members of the jury throughout the period of their segregation, and that said conduct of the marshal did in no wise affect the verdict of the jury nor operate to the prejudice of this petitioner."

As to the issue of the use of intoxicants by members of the jury, also raised by petitioner, the court found that "Liquor was procured for the jurors by the bailiff in charge (R. 148, 154, 192, 227, 366–367), and on a few occasions members of the jury procured liquor from a bellboy at the hotel (R. 124, 179, 366–367, 369). The evidence warrants a finding and the court finds that perhaps as many as ten of the fourteen jurors drank a whiskey highball or cocktail on one or more occasions during the fifteen days' confinement (R. 163, 198, 250, 255, 279, 333, 363, 368), and that the total liquor so consumed was in amount from seven to ten quarts. The evidence indicates that a considerable amount of the liquor so consumed was taken by the jurors for medicinal purposes,

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for colds and 'flu and because of the extremely cold weather (R. 162, 183, 192, 197, 374, 377, 382; see also R. 310), and in any event, the use of intoxicating liquor was not excessive (R. 115, 116, 124–125, 128, 131–132, 137, 154, 179–180, 206, 216, 219, 250, 255, 260, 308, 315, 341–342, 343, 365, 368, 376, 377, 382). The drinking of liquor was usually before the evening meal (R. 115, 120, 124–125, 137, 142, 162, 184, 197, 282, 332–333) and only on a few occasions later in the evening (R. 115, 120, 416). No liquor was drunk by any member of the jury during the day (R. 120, 162, 163, 184, 197, 376). There is no evidence to warrant the thought that the verdict of the jury was influenced in any way by such conduct of the jurors and the court finds this petitioner was in no wise prejudiced thereby."

ARGUMENT

I

Petitioner contends (Pet. 6–8, 12–13, 14–16, 19–31) that he was deprived of a fair and impartial trial because: (1) the United States Marshal made a statement to the jurors at the hotel the evening of the first day of the trial; (2) deputy marshals, not sworn as bailiffs, assisted in the segregation of, and were in contact with, the jury; (3) two lady deputies, accompanied by the chief deputy ate dinner with the jury at the hotel on two occasions, and played cards after dinner with some jurors until about 10 p. m. in the bailiff's room at the

hotel; and (4) some of the jurors drank intoxicating liquor in the evenings at the hotel.[2]

1. Petitioner's argument (Pet. 6–7, 12, 14, 19–23, 24–31) that he was prejudiced by the statement the United States Marshal made to the jury at the bailiff's room in the hotel on the evening of the first day of the trial is without merit. The marshal merely explained to the 14 assembled jurors "the nature of their confinement and segregation, and the rules pertaining thereto" (R. 84). As he stated (R. 397, 398):

> * * * I went in the first day after they were taken up, when we knew they were going to be under the rule and I had found from previous experience that it is easier to make one explanation to them at one time than at specific instances than to call each one of the fellows about an infraction. I explained to them this was a case that I didn't have any idea how long they would be locked up; that the newspapers would be censored; that they couldn't read anything about the case and mustn't discuss it with anyone outside or if any one discussed it with them to report it to the court; we didn't want to make it inconvenient for them and that if some necessity arose whereby some of their employees or some of their family wanted to see them they couldn't call their

[2] Petitioner asserted in his petition for writ of habeas corpus (R. 12) that it was not until after his petition for writ of certiorari in the criminal case was denied by this Court that he became aware of these occurrences.

> people up themselves, that we had given orders about the restrictions. You see I did that as a matter of expediency to make it easier on me and our employees later.
>
> * * * * *
>
> * * * I of course, wouldn't call that instructions. I think that is the wrong word. I couldn't instruct them. I recognized that that wasn't my duty except insofar as there were certain restrictions on them I wanted them to understand in the beginning so there wouldn't be any aftermath, so they might understand their duties and not be worrying me about it. I thought it better to tell them that in the beginning.

There was testimony that he also referred to the case as an important one involving considerable expense on both sides (R. 161, 214, 224), but even this merely emphasized the need for strict compliance with the court's order of segregation. Obviously, therefore, as the district judge found (R. 84) this "conduct of the marshal did in no wise affect the verdict of the jury nor operate to the prejudice of this petitioner."

Mattox v. *United States,* 146 U. S. 140, and *Stone* v. *United States,* 113 F. (2d) 70 (C. C. A. 6), upon which petitioner relies (Pet. 24, 25), are not in conflict with the decision below. In the *Mattox* case the conviction of murder was set aside because the bailiff had stated during the trial, within the hearing of jurors, that "This is the third fellow he [the defendant] has killed"; and, while the jury was deliberating, a newspaper

account of the case highly prejudicial to the defendant was read to the jury. In the *Stone* case, the conviction was reversed because a former associate of a defense counsel approached one of the jurors during a recess and asked the juror if he wanted to make some money.

2. The argument that petitioner was prejudiced simply because deputy marshals, not sworn as bailiffs, assisted the duly sworn bailiffs in handling the jury during its segregation, the chief deputy marshal having general supervision of all the officers (Pet. 22–23), is similarly without merit. The district court found (R. 84) that "the presence of deputy United States marshals in attendance upon said jury was in connection with their official duties in handling and safeguarding the jury pursuant to the orders of the court directing the segregation and custody of said jury." According to the testimony of the United States Marshal (R. 409), virtually all of his deputies were kept busy on the one case "watching things." Moreover, it was not contradicted that it was at the request of one of petitioner's trial counsel, "Fred Isgrig, who was a former District Attorney" that the chief deputy, in whom Isgrig had a lot of confidence, was placed in charge of the jury by the United States Marshal (R. 397–398, 405, 435). In view of the affirmative evidence as to the extreme care taken to protect the jury from improper outside influences (R. 83–84),

it is clear that the mere failure to administer a special oath to all of the deputies can not be said to have prejudiced petitioner. See *United States* v. *Ball*, 163 U. S. 662, 674.

3. Petitioner complains further of the fact that intoxicating liquor was available to the jurors, either through the bailiffs or the bell boys at the hotel (Pet. 3, 4, 7, 12, 14–15, 23). But the findings of the district court, *supra*, completely remove any doubt as to whether petitioner was thereby prejudiced. The liquor was used in the evening, at the hotel, but never in excessive amounts, and in some cases medicinally, with fruit juice, for colds and "flu." None was taken during the day; and there is no evidence suggesting that any juror was at any time even slightly intoxicated.

4. Petitioner attempts to make much of the fact that two lady deputy marshals had dinner with the jury on two occasions at the hotel and played cards with the jurors on each occasion until about 10 p. m. (Pet. 3–4, 7, 12, 14–15, 23, 28). But nothing in the record justifies his claim of prejudice. As the court below aptly said (R. 460), only "ugly and ill-founded insinuations can be drawn from the association of the jurors with the lady Deputies." Indeed, if the mere presence of the deputies was sufficient to deprive petitioner of a fair and impartial trial, as he seems to contend (Pet. 14, 15, 23, 24, 28), it is difficult to under-

stand why throughout his petition he attempts to create the impression that these lady deputies exceeded the bounds of propriety and provided the jurors with entertainment, "making themselves a social adjunct of the prosecution" (Pet. 15). The chief deputy marshal as well as the bailiff on duty was also present on each of these occasions. And nowhere in the record is there a scintilla of evidence that these ladies engaged in any improper conduct. Indeed, all of the testimony was to the effect that their conduct was above reproach. Furthermore, it is significant, we believe, that they were invited to these dinners by the jurors, and the jurors, not the Government, paid for their meals (R. 168–169, 277, 281, 287, 331–332, 400).

5. Finally, petitioner argues that he was prejudiced by the fact that jurors were taken to church, to a basketball game, to a show, and to the zoo; that one was taken to his farm for about an hour and a half; several to the barber shop, etc. (Pet. 4, 7–8, 15–16, 23–31). But on all of these trips the jurors were accompanied by officers of the court, and all the testimony was that at no time was the case discussed or the jurors subjected to any improper outside influences. As for petitioner's argument that it must be inferred this treatment prejudiced him by ingratiating the deputies—employees of the Government—with the jurors, it should be observed that the record shows the jurors were irked by their close confinement

(R. 314, 398), and juror Shamel, in particular, resented having a deputy accompany him on the visit to his farm, considering it an imposition (R. 309).

We think it is plain that petitioner greatly exaggerates the effect of the occurrences of which he complains. He failed utterly to establish the allegations of his petition, as required (*Johnson* v. *Zerbst,* 304 U. S. 458, 468; *Walker* v. *Johnston,* 312 U. S. 275, 286), and the prejudicial inferences he draws from the incidents in question are completely dispelled by affirmative evidence to the contrary. The record impels the conclusion that the handling and conduct of the jury in no way deprived him of a fair and impartial trial.

II

Petitioner contends that he was deprived of a fair and impartial trial because one of the jurors, on his *voir dire,* gave as his occupation "farmer and merchant" and failed to state that he was an assistant United States postmaster (Pet. 5, 8, 13, 31–35). There is no merit in this contention.

Juror Goggans, on his *voir dire,* when asked his occupation, responded "farmer and merchant" (R. 453–454), but in his deposition, taken in June 1941, he testified as follows (R. 387):

> Q. What is your business Mr. Goggans?
> A. Farming is, I count that my business. My brother and I are partners. We have

this business, we have three thousand acres of land and I look after the farm and he looks after the store. However, I look after the store some when I am out here and if I am away he takes my place.

* * * * *

Q. You say when you are out, your brother attends to the store mostly?

A. Yes.

Q. You attend to the farming?

A. Yes.

Q. When your brother is away do you attend to the store part of the time?

A. Yes.

Q. Your brother is also Post Master?

A. Yes.

Q. When he is away, do you attend to the Post Office?

A. Yes, sir. I am Assistant Post Master.

Q. You were at the time of this trial?

A. Yes.

Q. How long have you been Assistant Post Master?

A. Since 1920.

The mere fact that Goggans was a government employee would not, of course, have disqualified him. *United States* v. *Wood,* 299 U. S. 123. But petitioner argues that this is an exceptional case, inasmuch as Goggans was an employee of the government department specially interested in the prosecution, and contends that in the *Wood* case this Court expressly excepted such cases from its

decision. But even as to such exceptional cases, the Court there said (*id.*, at 150), "The law permits full inquiry as to actual bias in any such instances," thus indicating that actual bias is the true test. And in the instant case, even after learning that Goggans was an assistant postmaster, petitioner made no effort to ascertain if there was any basis for a charge of actual bias. Moreover, if, as this Court further indicated, *ibid.*, it would not be sensible to impute bias as a matter of law "to all storeowners and householders in cases of larceny or burglary," certainly an assistant postmaster, whose employment appears to have been only a casual or part-time one, necessitated by the business arrangement between him and his brother, could not be challenged for cause merely because the case in which he was summoned involved the use of the mails to effect a scheme to defraud.[3]

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[3] Petitioner's contention (Pet. 5–6, 8–9, 13, 17, 35–42) that he was denied a full and fair hearing by the convicting court's refusal to permit the introduction of certain evidence tendered to prove good faith on his part, is untenable. As the court below pointed out (R. 461), "error in the admission or rejection of evidence in the trial of a case does not destroy the jurisdiction and it is not reviewable on habeas corpus." The record indicates, moreover, that this point was presented to the court which affirmed petitioner's conviction in the assignments of error (R. 25–30), and that if, as petitioner contends (Pet. 17, 38–39), the court overlooked the point involved—i. e., that the evidence was offered to prove good faith on the defendant's part—this oversight was pointedly called to the court's attention in a petition for rehearing

CONCLUSION

The decision below is correct, and the petition presents neither any question of importance nor conflict of decisions. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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(R. 30–33, Index, p. 2), which was denied. Finally, the question was fully presented to this Court in a petition for a writ of certiorari (R. 34–40, Index, p. 2), which was also denied. 312 U. S. 692. Clearly, therefore, no further consideration of the question is warranted.

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